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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.M., a Person Coming Under the
Juvenile Court Law.

B239029
(Los Angeles County
Super. Ct. No. CK83592)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

O.E. et al.,

Defendants and Appellants.

APPEAL from an order of the Superior Court of Los Angeles County, Margaret Henry, Judge. Affirmed.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and Appellant O.E.

Karen B. Stalter, under appointment by the Court of Appeal, for Defendant and Appellant G.M.

Linda Rehm, under appointment by the Court of Appeal, for Appellant and Child.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court terminated mother O.E.'s and father G.M.'s parental rights over their infant child, J.M. On appeal, both parents and minor contend that the trial court erred when it terminated parental rights by declining to apply the beneficial parental relationship exception to adoption. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)¹ Finding no error, we affirm the juvenile court order.

BACKGROUND

J.M. first came to the attention of the Los Angeles County Department of Children and Family Services on August 9, 2010, when the Department received a referral for emotional abuse and severe neglect. Then-one-month-old J.M. was living with mother, O.E., and father, G.M. The referral alleged that mother was a victim of domestic violence, having been choked and kicked by father while he held J.M. in his arms.

A Department social worker interviewed mother, who reported that on August 7, 2010, father had returned home angry and intoxicated, and pushed, choked and hit her while he was holding J.M. Law enforcement responded to the family home that day, but father had left with J.M. and was not arrested. Mother said that father had a drinking problem and that he drank "excessively" on the weekends. According to mother, there had been previous incidents of domestic violence. Mother decided to leave the family home and live with maternal uncle. Maternal uncle confirmed mother's statements that father drank and was verbally abusive to mother.

Father denied choking or scratching mother. He also denied that he had an alcohol problem or that he was drunk on August 7, 2010. Father said that he was angry that day because mother had broken her cell phone and wanted to hit him with a flower vase.

On August 12, 2010, the Department filed a petition pursuant to section 300, subdivisions (a) and (b), alleging that parents had a history of domestic violence and engaged in violent altercations in J.M.'s presence, and that father had a history of alcohol abuse and currently abused alcohol, placing J.M. at risk of harm. The court issued a

¹ All further statutory references are to the Welfare and Institutions Code.

temporary restraining order against father, which would expire on September 2, 2010. The court detained J.M. as to father, releasing him to mother. The court also ordered monitored visitation twice per week, family maintenance services for mother, and family reunification services for father.

On August 19, 2010, maternal uncle told the Department that mother had left his home to reunite with father. Later that day, a Department social worker made an unannounced visit to maternal uncle's apartment, and found maternal uncle intoxicated and argumentative. Mother told the Department that she wanted to "cancel" the court's intervention and minimized the domestic violence. She no longer wanted to participate in the court case and wanted to reunite with father. J.M. was taken into protective custody and placed in foster care.

On August 24, 2010, the Department filed an ex parte application for an order pursuant to section 385, seeking to remove J.M. from mother's custody, due to mother's failure to abide by the restraining order and protect J.M. At the section 385 hearing, the court detained J.M. from mother and ordered monitored visitation for both parents at least twice a week, with parents visiting separately.

On August 20 and 25, 2010, the Department interviewed father and mother, respectively, for the jurisdictional hearing. Mother retracted her previous statements, claiming father had never hit her. She stated instead that she intended to hit father with a vase, but father had reached out while he was holding J.M. and took the vase from her. Mother had always been jealous that father spoke to other women who lived in the family home, and she and father had been verbally argumentative. Mother told police that father had scratched her, even though mother had burned herself while toasting bread. She "never thought it would lead to all this." She lied when she accused father of being drunk on August 7, 2010, and she had never seen him do drugs.

Father denied ever hitting mother. According to father, mother was the one who was "slightly aggressive," and she was so upset she broke her own phone. Mother had made false allegations because she was upset with father. Father denied being drunk on August 7, 2010. He drinks a few beers about once a month.

Neither the paternal grandmother nor the maternal aunt observed any abuse in the family home. The maternal uncle could not be reached.

Both parents said they loved J.M. and each other and wanted to regain custody of J.M. They believed mother's jealousy was the family's main problem. The Department opined that the incident on August 7, 2010, escalated from yelling to mother grabbing a vase and threatening father. The Department believed that both parents needed to learn conflict resolution skills.

At a September 2, 2010 pretrial resolution conference, the court ordered that J.M. be placed with paternal grandmother once the Department could verify clean criminal background checks on the adults in the home, and after the grandmother acquired appropriate bedding for J.M. On September 16, 2010, the Department placed J.M. with paternal grandmother.

At the combined jurisdictional/disposition hearing, parents waived their rights and submitted on the petition. The petition was sustained as amended to exclude allegations of a physical confrontation between parents and to exclude the allegation that father abused alcohol. The sustained allegation, under section 300, subdivision (b), was that parents "have a history of domestic violence and engaging in verbal altercations in the child's presence[] . . . endanger[ing] the child's physical and emotional health and safety and plac[ing] the child at risk."

The court ordered reunification services for both parents. Father was ordered to participate in domestic violence counseling, conjoint counseling with mother if parents intended to remain together, and six weekly, random alcohol tests. If any test was missed or dirty, father would be required to participate in a program of alcohol rehabilitation. The court permitted father to have monitored visits at paternal grandmother's house and gave the Department discretion to liberalize his visits. Mother was also ordered to participate in domestic violence counseling, and her visits were to be monitored, with the Department having discretion to liberalize.

On December 17, 2010, the Department submitted a three-month progress report. Parents were living together. Mother attended five domestic violence classes, as well as

anger management and parenting education classes, which were not ordered by the court. Father enrolled in domestic violence counseling on December 4, 2010, but had not attended any classes yet. Both parents had just enrolled in individual and conjoint counseling on December 4, but had not yet attended any sessions. Father tested negative for alcohol six times in September and October, and was therefore not required to participate in alcohol rehabilitation. According to paternal grandmother, mother and father visited J.M. “on a regular basis,” and there had been no problems. The Department concluded that since the parents had just started to comply with the case plan, it would be “detrimental” to return minor to the parents.

The court liberalized mother’s visits to unmonitored, for two to four hours at a time, on the condition that the visits were not to occur in the family home and that father was not to be present during the visits.

On March 18, 2011, the Department submitted a report for the six-month review hearing. (§ 366.21, subd. (e).) Mother and father reported that they intended to stay together as a couple and that they had not had any recent problems in their relationship. Father attended eight sessions of domestic violence counseling, where his instructor said he was “attentive, cooperative, and willing to share.” Mother had started individual therapy, and her therapist reported that mother is ““actively engaged in the therapeutic process . . . her priority appears to be her role of a mother and improved communication with her partner.”” She also completed 12-week parent education and anger management courses. Parents had not started conjoint counseling, as mother’s therapist recommended waiting until mother completed individual counseling first. Father visited then-eight-month-old J.M. several times a week. Mother also visited several times a week, and had watched J.M. for several hours at a time while paternal grandmother worked. Parents sometimes visited J.M. together on weekends. According to paternal grandmother, the parents’ visits had been uneventful and both parents behaved appropriately. She was willing to adopt J.M. if parents failed to reunify with him. The Department reported that J.M. was doing well in paternal grandmother’s care and was developmentally on target.

At the six-month review hearing, the court gave the Department discretion to allow the parents to visit together and to expand parents' visits to include overnight visitation.

On May 13, 2011, the Department submitted another progress report. Mother was having unmonitored four-hour visits with J.M. on weekends, and several monitored visits throughout the week. Father's visits remained monitored. Parents had not visited J.M. together, but paternal grandmother indicated she would be comfortable if the parents began to visit J.M. together in her home. Mother and father had participated in five conjoint counseling sessions, but there was no progress report from their therapist. There was also no information on father's progress in domestic violence counseling. Mother completed 26 domestic violence sessions, and 12 individual therapy sessions. Her therapist reported that mother "is actively engaged in the therapeutic process and presents as respectful and cooperative."

At the May 13, 2011 hearing, the court liberalized mother's visits to unmonitored for eight hours at a time, and permitted parents to visit together while monitored by grandmother, but did not permit conjoint unmonitored visits.

On September 16, 2011, the Department submitted a status review report for the 12-month review hearing. (§ 366.21, subd. (f).) On July 1, 2011, each parent reported to the social worker that they had broken up and mother had moved out. According to mother, father would come home drunk in the early morning, and was controlling and jealous. Mother felt that father was not spending enough time with J.M., and that when father was visiting J.M. at paternal grandmother's house, he spent his time socializing with his family members instead of focusing on J.M. She also told her counselor that father pushed and shoved her when she attempted to leave the house, but clarified later that father had only grabbed her hand as she was leaving the house. She shook him off and he released her hand quickly. The parents' couples counselor informed the Department that she could no longer provide the parents with counseling due to the recent incident of domestic violence.

Father denied drinking excessively and returning home late, saying that he sometimes had some beers after work with his boss and coworkers. He accused mother of being possessive and emotionally unstable. He explained that once while they were arguing, she started screaming ““help me”” in their apartment when he had not touched her. Mother threatened to overdose on Tylenol on two occasions, but father took the pills away from her. Mother denied ever trying to overdose with pills.

Later in July, mother told the Department that she and father had reconciled and were living together again. She said that father had stopped drinking and returning home late.

In early September, mother told the Department social worker that she was worried about the possibility of domestic violence in the future, but denied it occurred in the past. Father told the social worker that he loved mother but was “confused” about their relationship. He feared that due to mother’s lies, he might end up in jail.

Both parents agreed that returning J.M. to them in such an unstable environment could pose a risk to his safety and well-being. Father stated he preferred J.M. to remain with the paternal grandmother, and agreed with a plan for the him to be adopted by her.

Between March and September 2011, father visited J.M. at least three times a week for about an hour each visit. Paternal grandmother reported his interactions with J.M. were “affectionate and attentive.” Mother visited about two to three times a week, and her visits had been unmonitored for up to eight hours outside paternal grandmother’s home. Paternal grandmother stated that mother returned J.M. clean and well cared for. Mother said she was very happy during her visits with J.M. J.M. recognized both parents and was excited to see them. However, parents had not visited J.M. together in paternal grandmother’s home.

Due to the parents’ difficulties in their relationship, the Department recommended that both parents’ visits be monitored. The Department also recommended that the juvenile court terminate reunification services and set a hearing to select and implement a permanent plan. Father agreed that minor should remain with paternal grandmother, who preferred to become J.M.’s legal guardian. Paternal grandmother said she had a good

relationship with mother and father, and would continue to be in contact with them if a plan of legal guardianship was implemented. Paternal grandmother “loves [J.M.] like . . . her own son,” and “wants to raise [J.M.] within the family.”

At the 12-month review hearing, mother challenged the termination of reunification services and requested a contested hearing. At the September 23, 2011 contested hearing, mother represented that while she was still living with father, she intended to move out after she had saved enough money. Both parents requested further reunifications services. Father represented that he had completed 27 domestic violence classes. The court terminated family reunification services and set the section 366.26 hearing.

On January 12, 2012, the Department reported that paternal grandmother had decided to pursue adoption instead of guardianship. She had been hopeful parents could resolve their issues and reunify with J.M., but decided she wanted to adopt because she had “recognize[d] that the parents [would] not ameliorate their issues as a couple or as individuals.” Paternal grandmother was open to continuing to monitor visitation between J.M. and his parents. Her home study was completed and approved on January 11, 2012.

At the section 366.26 hearing, mother objected to the termination of parental rights, and the court set the matter for contest. The contested hearing took place on January 20, 2012. Father testified that he visited J.M. three to four days a week, for two to four hours each visit, and five to six hours on Sunday. During the visits, he fed J.M., read to him, watched movies with him, played with him, and helped bathe him. J.M. called father “Poppy,” and when father arrived for visits, he would run up and embrace father. Father testified he felt a strong bond with J.M.

Mother testified that she had been having unmonitored visits with J.M. for about a year and a half. She visited him for eight hours on Monday, and before she started working, she visited him every day for about three hours. Mother was there when J.M. took his first steps at 11 months old. J.M. calls her “Mommy,” but also refers to paternal grandmother as “Mommy.” When mother arrives for visits, J.M. would run to her and embrace her.

Minor's counsel argued she believed that parents had demonstrated commitment to J.M., visited him very regularly, and mother had unmonitored visitation for most of his life. Mother and father contended that parental rights should not be terminated, because both parents had maintained regular visitation and J.M. would benefit from a continuing relationship.

The juvenile court found that the section 366.26, subdivision (c)(1)(B)(i) exception to the termination of parental rights did not apply. The court concluded that "adoption is the best plan if that's what the caretaker thinks the best plan is. I don't think she rushed into the adoption plan. I don't think she would have gone legal guardianship if she thought she could otherwise control the relationship, but I think we have a volatile relationship which can be detrimental to the child and that the caretaker needs the ultimate authority of being the real and permanent parent." The court concluded that it would not be detrimental to J.M. to be adopted. Paternal grandmother was designated as J.M.'s prospective adoptive parent, and parental rights were terminated. At the time parental rights were terminated, J.M. was 18 months old.

On January 20, 2012, mother and father filed timely notices of appeal. On February 24, 2012, minor's counsel also timely appealed.

DISCUSSION

Mother, father, and minor contend that the juvenile court erred in finding that the beneficial parental relationship exception to the termination of parental rights in section 366.26, subdivision (c)(1)(B)(i) did not apply. Under section 366.26, subdivision (c)(1), the juvenile court must terminate parental rights if it finds by clear and convincing evidence it is likely the child will be adopted if parental rights are terminated. Nevertheless, the court will not terminate parental rights if it determines that doing so would be detrimental to the child based on one of several statutory exceptions. (§ 366.26, subd. (c)(1)(B).) The party challenging termination of parental rights bears the burden of proving that one or more of the statutory exceptions applies. (*In re C.F.* (2011) 193 Cal.App.4th 549, 553; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.)

To establish the beneficial parent-child relationship exception, the parents must prove termination of parental rights would be detrimental to J.M. because: (1) parents maintained regular visitation and contact with J.M., and (2) J.M. would benefit from continuing his relationship with parents. (§ 366.26, subd. (c)(1)(B)(i); *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449-450.) The “benefit” prong of the exception requires a parent to prove that his or her relationship with the child “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) “Because a parent’s claim to . . . an exception [to termination of parental rights] is evaluated in light of the Legislature’s preference for adoption, it is only in exceptional circumstances that a court will choose a permanent plan other than adoption. [Citation.]” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.)

Some courts have held that challenges on appeal to a juvenile court’s determination under section 366.26, subdivision (c)(1)(B)(i) are governed by the substantial evidence standard of review. (See, e.g., *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576 [“we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order”]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53 & fn. 4.) Others have applied an abuse of discretion standard of review. (See, e.g., *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [“a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination”]; *In re Aaliyah R.*, *supra*, 136 Cal.App.4th at p. 449.) Under either standard, we find no error with the juvenile court’s order.

The parent-child relationship must promote “the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with a new, adoptive parents. . . . [T]he court balances the strength and quality of the parent/child relationship in a tenuous placement against the security and sense of belonging a new family would confer. If severing the natural parent/child relationship

would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; see also *In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.)

To establish the application of the beneficial parental relationship exception, “the parents must do more than demonstrate ‘frequent and loving contact’ [citation], an emotional bond with the child, or that the parents and child find their visits pleasant. [Citation.]” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) Whether the exception applies is determined “on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

Mother and father contend that the juvenile court improperly relied on evidence of ongoing domestic violence, and paternal grandmother's assessment of what was best for J.M. rather than exercising its own discretion. Mother, father, and J.M. also contend that parents maintained regular visitation, and that J.M. would benefit from a continuing relationship with his parents.

While mother and father visited J.M. frequently, father never progressed to unmonitored visits, and mother had her unmonitored visits taken away due to the instability of her relationship with father. Neither parent ever attained overnight visitation. J.M. was detained from father when one month old, and detained from mother less than two weeks later. For most of his life, J.M. has lived with paternal grandmother, whom he also refers to as “Mommy,” and who has met all of his needs and acted as his primary caregiver. Even though parents often cared for J.M., much as an extended family member would, they did not fulfill the role of parents in any meaningful way. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) While it is obvious that J.M. has a loving relationship with his parents, we cannot say that “the relationship [with the parent] promotes the well-being of the child to such a degree as to outweigh the well-being the

child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Although the court remarked that “adoption is the best plan if that’s what the caretaker thinks the best plan is,” it is clear the court was merely acknowledging the paternal grandmother’s willingness to pursue adoption rather than legal guardianship. And, even if paternal grandmother’s opinion factored into the court’s reasoning, it did not supplant the court’s exercise of discretion, but instead supported its conclusion that the permanency of adoption was preferable to a continuing parental relationship with mother and father. Paternal grandmother could sensibly assess the benefit of J.M.’s relationship with parents through her supervision of visitation and her special bond with J.M. Also, the ongoing domestic violence between parents was relevant to why they had not progressed further in their visitation with J.M., which affected the strength of their bond with him. Accordingly, the juvenile court did not err in finding that the beneficial parental relationship exception did not apply. (*In re Celine R.* (2003) 31 Cal.4th 45, 53; *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350 [it is only in an extraordinary case that the preservation of a parent’s rights will prevail over the preference for adoption].)

DISPOSITION

The juvenile court order is affirmed.

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GRIMES, J.

I CONCUR:

BIGELOW, P. J.

FLIER, J., Dissenting

Because I conclude the juvenile court should have applied the beneficial parental relationship exception to adoption, I respectfully dissent.

Although adoption is the preferred permanent plan, Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i) carves out an exception to adoption.² (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573-574.) That exception applies when, as in this case, (1) the parents maintained regular visitation with the child and (2) the child would benefit from continuing his relationship with his parents. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 207.) Courts have “interpreted the phrase ‘benefit from continuing the relationship’ to refer to a ‘parent-child’ relationship that ‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’” (*Ibid.*, quoting *In re Autumn H.*, *supra*, at p. 575.)

In this case, it is undisputed that mother and father both regularly visited and took care of J.M. throughout the dependency period. Mother enjoyed unmonitored visits for a year and a half, cared for J.M. when the paternal grandmother worked, and had extended visits lasting up to eight hours. Before she started working, mother visited every day. Although father’s visits were monitored, he was consistent in his visits and visited at least three times a week, with some of his visits lasting up to four hours.

² Undesignated statutory citations are to the Welfare and Institutions Code.

Mother and father both acted as parents, taking care of J.M. during their visits. Mother fed J.M. and changed his diapers. Mother was present when J.M. started walking and when he started speaking. Father played with J.M., changed his diapers, fed him, bathed him, and gave him toys. The Los Angeles County Department of Children and Family Services described mother's and father's visitation as "consistent and committed."

J.M. had a strong, positive bond with both mother and father. J.M. referred to mother as mother; he was excited to see her, and embraced her whenever she visited. When father visited, J.M. ran up to him, embraced him and called him poppy. J.M.'s enthusiasm for mother's and father's visits evidenced his bond to them. At J.M.'s young age of 16 months he could not verbally describe his bond to mother and father, but his conduct toward them during their visits demonstrated his bond to them and his love for them. The fact that J.M. also had a positive relationship with his paternal grandmother does not negate the harm he would suffer from the loss of his relationship with mother and father. (*In re S.B.* (2008) 164 Cal.App.4th 289, 300.) Here, mother and father demonstrated that J.M. would derive more than an incidental benefit by maintaining contact with them. (See *In re C.F.* (2011) 193 Cal.App.4th 549, 559.)

In ruling that adoption was the best plan for J.M., the court ignored J.M.'s strong attachment to mother and father and instead focused on paternal grandmother's wishes. The court stated: "I think adoption is the best plan if that's what the caretaker [(paternal grandmother)] thinks the best plan is." Contrary to that statement, the best plan for J.M. was the one required by section 366.26, subdivision (c)(1)(B)(i) – maintaining mother's and father's parental rights because they regularly visited and J.M. would benefit from continuing his relationship with them. I would reverse the juvenile court's order and remand for the juvenile court to consider legal guardianship as J.M.'s permanent plan.

FLIER, J.